in the High Court at Johor Bahru, and having heard the submissions of Counsel for the second defendant in that suit, no satisfactory explanation was given why the issue of liquidated damages relating to clause 3.4 of the agreement was not raised at the trial. The second defendant offered no reason why it could not with reasonable diligence have claimed at the trial of the civil suit, the relief it was claiming against the plaintiffs now in this application.

On the evidence before me it is abundantly clear that the second defendant knew of its right to make a claim in regard to liquidated damages relating to clause 3.4 of the agreement prior to, and at the trial, but for reasons best known to the second defendant, it chose to remain silent on this issue.

In regard to the submissions by learned Counsel for the second defendant that the Court has the jurisdiction to allow the application by the second defendant, it must be borne in mind that in the present case, apart from the reasons given above, this Court is *functus officio* once judgment on the merits of the case had been pronounced and the order perfected. In the instant case the Supreme Court had affirmed the judgment of the High Court and the order of the Supreme Court has been drawn up, perfected and agreed to by all parties concerned. See the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 and *Emar Sdn. Bhd. [under receivership] v. Aidigi Sdn. Bhd. and Anor Appeal* [1992] 2 MLJ 734.

Accordingly the application of the second defendant is dismissed with costs.

PUA LAI ONG

v.

KASSIM BIN YUNUS & ANOR.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 23-81-90]
19 MARCH 1993

TORT: Road accident - Plaintiff thrown off bus - Claim for damages for injuries sustained - Defendants not offering any evidence in rebuttal of plaintiff's evidence - Whether there was proof of contributory negligence - Whether evidence given by plaintiff could be used to infer contributory negligence - Apportionment of liability - Quantum of damages.

The plaintiff was employed as a bus conductor on a bus owned by the first defendant. The second defendant was, at all material times, the driver of the bus. During the course of a routine journey, while negotiating a roundabout, the swaying of the bus caused the plaintiff to be thrown off the bus and onto the road. The plaintiff sustained serious injuries and claimed damages against the defendants.

The defendants pleaded that the plaintiff was the author of his own misfortune in that at the material time he was positioned at the door of the bus and was repairing the door when it was unsafe to do so. At the trial the defendants offered no evidence in support of their allegations and the question that arose was whether the Court could use the evidence given by the plaintiff to infer negligence on his part.

Held:

[1] Although the burden of proving contributory negligence on the part of the plaintiff rested on the defendant, nevertheless the Court may infer contributory negligence on the part of the plaintiff from the plaintiff's own evidence.

[2] The plaintiff, as a bus conductor, was under a statutory duty to ensure the safety of everyone, including himself, while on board the bus. One of the precautions expected to be taken by a conductor to ensure the safety of passengers in the bus was to ensure that the door of the bus was always shut while the bus was in motion which the plaintiff, as conductor, had failed to do.

[3] Although the plaintiff was aware that the bus was speeding when negotiating the roundabout, he chose that particular moment to walk near the opened door towards the driver, with only one hand to cling on to the overhead railings while the other hand was holding his money-bag.

[4] In the circumstances and having regard to the facts of the case, the plaintiff could reasonably have avoided the consequences of the second defendant's negligence had he kept the door of the bus shut or alternatively had he sat down while the bus was negotiating the roundabout at a fast speed.

[5] Although it was the negligent driving of the second defendant which had caused the bus to sway to the left and right, nevertheless the plaintiff was in a position which he knew or must have known was a dangerous position, in defiance of the dictates of common sense. The plaintiffs position at the material time was one of the causes of his injuries and having regard to the plaintiff's share of the blameworthiness, liability was apportioned equally.

[Plaintiff's claim allowed. Orders accordingly].

Case referred to:

Sharpe v. S. Ry [1925] 2 KB 311 ***(refd)***

Kek Kee Leng v. Teresa Bong Nguk Chin & Anor. [1978] 1 MLJ 61 ***(foll)***

Davies v. Swan Motor Co. (Swansea) Ltd. (Swansea Corpn. and James, Third Parties) [1949] All ER Vol. 1 620 ***(foll)***

Tan Teck Chye v. Chia Mee Sieng MLJ 29 July 1988, p. xxvi ***(cit)***

Abdul Munir bin Hj. Abdul Rahman v. Mohamed Adzha bin Hassan [1985] 2 MLJ cl ***(cit)***

Ng Kah Heng v. Ng Pek Choo [1989] 1 CLJ 962 ***(cit)***

Noor Azahar bin Habin v. Rajaswaria/p Sithampara Pillai & Anor. [1991] 1 CLJ 150 ***(cit)***

Wong Fook & Anor. v. Abdul Shukur bin Abdul Halim (Wong Piang Loy, Third Party) [1990] 2 CLJ 382/[1991] 1 MLJ 46 ***(cit)***

Mohamed Fahmi Hassan v. Swissco Pte. Ltd. & Government of the Republic of Iraqi (Iraqi State Enterprise for Maritime Transport) - Third Party [1986] 1 MLJ 461 ***(cit)***

Abdul Jalil bin Abdul Wahab v. Liew Foong [1990] 1 CLJ 729 ***(cit)***

Marappan & Anor. v. Siti Rahmah bte Ibrahim [1990] 1 CLJ 32/[1990] 1 MLJ 99 ***(cit)***

Legislation referred to:

Public Service Vehicles (Licensing and Conduct of Drivers, Conductors and Passengers) Rules 1959, Rule 15(d)

Other sources referred to:

Clerk and Lindsell on Torts, 15th Edn., p. 582, para 11-90

For the plaintiff- K. Thavaneesan (G. Shanmugalinggam and Siva Kumar with him)

For the defendants - Tengku Farik

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:

The plaintiff and the second defendant were employees of the first defendant. The plaintiff was employed as a bus conductor while the second defendant was employed as a bus driver. On the day in question (20 January 1983), the company's bus driven by the second defendant with the plaintiff as the conductor left the Klang Bus Station at about 10 p.m. heading for Pelabuhan Kelang. It was a routine journey. From Jalan Tengku Kelana the bus proceeded into the Simpang Lima roundabout Klang. While negotiating the roundabout to enter Jalan Pelabuhan Kelang, the second defendant drove the bus at a fast speed thus causing the bus to sway to the left and to the right. This swaying of the bus had caused the plaintiff to be thrown off the bus and onto the road. The plaintiff sustained serious injuries.

The plaintiff alleged that the second defendant was guilty of negligent driving and accordingly claimed against the first and second defendants for damages. The defendants, on the other hand, in their statement of defence, pleaded that it was the plaintiff who was wholly or partially to be blamed for the accident. The "particulars of negligence" of the statement of defence states, *inter alia*, that the plaintiff at the material time positioned himself at the door of the bus and was repairing the door when it was unsafe to do so.

At the trial, however, only the plaintiff and his only witness, the medical specialist (PW2), gave evidence. The defence offered no evidence. I find the second defendant guilty of negligence; and I also find the first defendant, being the employer of the second defendant, vicariously liable.

Although the defence offered no evidence and therefore the defence allegation in the statement of defence, that the plaintiff at the material time positioned himself at the door of the bus and was attempting to repair the door, remains unproven, nevertheless, based on the plaintiff's own testimony, I also find that there was contributory negligence on the part of the

plaintiff. Although the burden of proving contributory negligence in the plaintiff rests on the defendant, nevertheless, the Court may infer contributory negligence on the part of the plaintiff from the plaintiff's own evidence (**Clerk and Lindsell on Torts,** 15th Edn.,. p. 582, para 11-90; *Sharpe v. S. Ry.* [1925) 2 KB 311).

There was contributory negligence because of two reasons. First, the plaintiff, as a bus conductor, was under a statutory duty to ensure the safety of everyone, including himself, while on board the bus. Rule 15 (d) of the Public Service Vehicles (Licensing and Conduct of Drivers, Conductors and Passengers) Rules 1959 (L.M 177/1959) states:

> 15. Behaviour of drives and conductors
>
> A driver or a conductor when acting as such -
>
> (a) .....
> .....
> .....
> (d) shall take all reasonable precautions to ensure the safety of passengers in or on or entering or alighting from the vehicle.

In my view, one of the precautions expected to be taken by a conductor under the above rule in order to ensure the safety of passengers in a bus, is to ensure that the door of a bus is always shut while the bus is in motion. For this will prevent passengers, especially those near the door, from falling off the bus should the bus sway violently while in motion. This will also prevent (or at least discourage) passengers boarding or alighting from the bus while it is in motion. Indeed, in the course of his submission, learned Counsel for the plaintiff himself concedes that it is dangerous to drive a bus with the door opened. In the present case, the bus had only one door for passengers to board or alight from, located in the middle part of the bus on the near side. The plaintiff, as a bus conductor, had failed to ensure that the door was shut while the bus was in motion. He gave evidence that it was normal for the door to be left opened, that his employer was aware of the laxity and that the latter never objected. However, I do not consider all this as a valid or reasonable excuse for the failure to take the precaution.

Secondly, although the plaintiff was familiar with the route, was aware that the bus was entering a roundabout, and was also aware that the bus was speeding when negotiating the roundabout, yet he chose at that particular moment to walk near the opened door towards the driver, with only one hand to cling on to the overhead railings while the other hand was holding his money-bag. He had the opportunity to sit until the bus had left the roundabout since the bus, being a forty-four seater, had at the material time only about twenty passengers and, therefore, there were many vacant seats. Yet he chose not to sit and the only reason he gave for walking near the door at the particular moment instead of sitting down was that he wanted to sit near the driver. Yet the plaintiff himself admitted correctly during cross-examination that it was dangerous even to stand while the bus was negotiating the roundabout.

In considering whether or not the plaintiff was guilty of contributory negligence I am guided by the principle laid down by the Federal Court in *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor.* [1978] 1 MLJ 61 where at p. the 62 the Court held:

> Contributory negligence is an expression meaning "negligence materially contributing to the injury" (see Lord Porter in *Caswell v. Powell Duffryn Associated Colleries* [1940] AC 152, 186), the word "contributory" being regarded "as expressing something which is a direct cause of the accident" (see judgment of Lord Maugham in *R v. Southern Canada Power Co.* [1973) 3 All ER 923, 930). However, the word "negligence" is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression "contributory negligence" it does not mean breach of duty. It means the failure of a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. More recently, Lord Simon in giving the judgment of the Privy Council in *Nance v. British Columbia Electric Ry* [1951] AC 601, 611 said at p. 611:
>
> > When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory is set up as a shield against the obligation to satisfy the whole of the plaintiffs claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

> In short, the question in this case depends entirely on whether the plaintiff could reasonably have avoided the consequences of the second defendant's negligence having regard to the specific findings of the learned Judge.

Based on the above principle, I have asked myself whether the plaintiff in the instant case could reasonably have avoided the consequences of the second defendant's negligence having regard to the facts of the case. On the basis of the reasons that I have given above, my answer to this question is in the affirmative. I just wish to add that, notwithstanding the swaying of the bus due to the negligent driving of the second defendant, the plaintiff, in all probability, would not have been thrown off the bus had he kept the door of the bus shut. Alternatively, even if he had failed to ensure that the door was shut, he still would not have been thrown off the bus if he had been concerned about his safety and had sat down instead of walking near the door when he knew that the bus was negotiating the roundabout at a fast speed and it was not safe for him even to stand at that moment. It is significant to note that from the plaintiff's own evidence it may be inferred that he was the only passenger who was thrown off the bus.

On the apportionment of liability, in *Davies v. Swan Motor Co. Swanswa), Ltd. (Swansea Corporation and James, Third Parties*) [1949] All ER Vol. 1 620 Denning L.J. (as he then was) said in his judgment at p. 632:

> While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the Court to be "just and equitable," having regard to the claimant's "share of the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.

In the present case, although it was the negligent driving of the second defendant that caused the bus to sway to the left and to the right, nevertheless, the plaintiff was in a position which he knew or must have known was a dangerous position, in defiance of the dictates of common sense. If he had not been in that situation, he would not have been injured. His position was certainly one of the causes of his injuries. I regard the plaintiff as an employee acting negligently, and, indeed, disobediently to the law, in the course of his employment. I think the plaintiff was very considerably to blame. Accordingly, having regard to the plaintiffs share of the blameworthiness and as to what is just and equitable based on the facts of the case as a whole, I apportion the liability equally (that is, 50:50) between the second defendant and the plaintiff.

On the quantum of damages for pain and suffering and loss of amenities, learned Counsel suggests that an award of RM180,000 would be appropriate in view of the age of the plaintiff at the time of the accident and the extent of injuries. The opinion of the medical specialist (PW2) who examined the plaintiff as regards the extent of the injuries is given at p. 2 of the Agreed Bundle of Documents (P1), and is as follows:

> *Opinion:*
>
> This gentlemen suffered from cervical cord damage resulting in left sided hemiparesis (weakness). Besides he has loss of bladder and bowel control (incontinence). He has failed to regain any function in the left side and this damage is permanent. This patient is not likely to walk again and return to gainful employment. The loss in earning capacity is 100 percent and he would lead a wheelchair life with assistance. Hence provision has to be made to cover the cost of this assistance. He will also not be able to have a normal sexual life.

During cross examination, PW2 explained that on admission to the General Hospital, the plaintiff was completely paralysed from the neck downwards. The injury was at the neck cervical spine 5 and 6. Both the upper limbs and lower limbs were paralysed. With time, treatment and rehabilitation, there was partial recovery in the upper limbs. He also explained that presently the plaintiff is paralysed in the lower limbs that is, from the waist downwards. He has recovered in the upper limbs, but is still weak. The left side of the upper limbs is much weaker as compared to the right side.

Learned Counsel cites several authorities: *Tan Teck Chye v. Chia Mee Sieng* MLJ 29 July, 1988 p. xxvi; *Abdul Munir bin Hj. Abdul Rahman v. Mohamed Adzha bin Hassan* [1985] 2 MLJ p. cl; *Ng Kah Heng v. Ng Pek Choo* [1989] 1 CLJ 962; *Noor Azahar bin Habin v. Rajaswari a/p*

Sithampara Pillai & Anor. [1991] 1 CLJ 150; *Wong Fook & Anor. v. Abdul Shukur bin Abdul Halim* (Wong Piang Loy, Third Party [1991] 1 MLJ 46; *Mohamed Fahmi Hassan v. Swissco Pte. Ltd. & Government of the Republic of Iraqi (Iraqi State Enterprise for Maritime Transport) - Third Party* [1986] 1 MLJ 461; and *Abdul Jalil bin Abdul Wahab v. Liew Foong* [1990] 1 CLJ 729. Based on these authorities and taking into account the age of the plaintiff (25 years old at the time of the accident) and the impotency suffered, I am of the opinion that an award of RM180,000 for pain and suffering and loss of amenities, as submitted by learned Counsel, is appropriate.

On damages as to the loss of earnings incurred and as to the loss of future earnings, the plaintiff gave evidence that he earned RM300 per month as a bus conductor and that he has ceased to work since the accident as a result of the injuries sustained. The plaintiff was unable to substantiate this claim with any documentary evidence because, according to him, he never signed any voucher each time he received his pay and in cross-examination he said his employer never contributed either to EPF or SOCSO. In view of the fact that the amount claimed is reasonable and that in any event his evidence was not rebutted, I accept that his loss of earnings should be calculated on the basis of RM300 per month.

On damages as to the cost of nursing care incurred and as to the cost of future nursing care, learned Counsel for the plaintiff submits that it should be RM300 per month. From the evidence, the plaintiff has no control over his bowels and bladder. He is confined to the wheelchair and requires the assistance of others for all his daily needs. Although the plaintiff has and will be looked after at home by his mother and brother instead of at an institution, it is now settled that compensation can be given for services rendered by parents (*Marappan & Anor. v. Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99). I accept the claim of RM300 per month as fair.

As to the number of years' purchase in respect of loss of future earnings and cost of future nursing care (that is, loss of earnings and cost of nursing care from the date of judgment onwards), by consent of both learned Counsel, I rule that it should be 10.

All these awards will be reduced by 50 percent.

The awards for loss of earnings and for cost of nursing care in respect of the period from the date of the accident until the date of judgment will bear interest at the rate of 4 percent per annum from date of accident.

There shall be interest payable on the award of general damages for pain and suffering and loss of amenities at the rate of 8 percent per annum calculated from the date of writ until date of realisation.